



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

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OFFICE OF
WATER

MEMORANDUM

SUBJECT: Concentrated Animal Feeding Operation Program Update after *National Pork Producers Council v. EPA*

FROM: James A. Hanlon
Director, Office of Wastewater Management

TO: Water Division Directors
Regions 1-10

On March 15, 2011, the Fifth Circuit Court of Appeals issued *Nat'l Pork Producers Council v. EPA* ("NPPC") 635 F.3d 738 (5th Cir. 2011). In *NPPC*, the court vacated the requirement that concentrated animal feeding operations (CAFOs) that "propose to discharge" have National Pollutant Discharge Elimination System (NPDES) permits. The purpose of this memorandum is to provide a brief synopsis of the Fifth Circuit's decision and present EPA's expectations as we continue to work toward full implementation of the NPDES CAFO program.

In February 2003, EPA issued revised Clean Water Act (CWA) permitting requirements for CAFOs. Both environmental and industry groups challenged the 2003 final rule, and, in February 2005, the U.S. Court of Appeals for the Second Circuit issued its decision in *Waterkeeper Alliance et al. v. EPA*, 399 F.3d 486 (2d Cir. 2005). Among other things, the court held that EPA does not have authority under the CWA to require CAFOs that have only a potential to discharge to obtain NPDES permits. In 2008, EPA issued revised regulations in response to the *Waterkeeper* decision. Among other changes, the revised regulations required CAFOs that discharge or propose to discharge to obtain an NPDES permit. Subsequently, environmental and industry groups filed petitions for review of the 2008 rule, which were consolidated in the U.S. Court of Appeals for the Fifth Circuit. EPA settled the environmental petitioners' challenge in May 2010. On March 15, 2011, the Fifth Circuit Court of Appeals issued its decision in *NPPC*, which addressed industry groups' challenges to the 2008 CAFO rule.

In *NPPC*, the court vacated the regulatory requirement that CAFOs that "propose to discharge" apply for NPDES permits. Citing *Waterkeeper* and *Service Oil v. EPA*, 590 F.3d 454 (8th Cir. 2009), the court concluded, "these cases leave no doubt that there must be an actual discharge into navigable waters to trigger the CWA's requirements and the EPA's authority. Accordingly, the EPA's authority is limited to the regulation of CAFOs that discharge. . . . we conclude that the EPA's requirement that CAFOs that 'propose' to discharge apply for an

NPDES permit is ultra vires and cannot be upheld.” *NPPC*, 635 F.3d at 751. Based on this decision, the national standard is CAFOs that do not discharge are not required to have an NPDES permit.

In response to *NPPC*, which applies nationally, we will revise the CAFO regulations to remove from the federal regulations the requirement that CAFOs that “propose to discharge” have NPDES permits. We also will update the Implementation Guidance on CAFO Regulations – CAFOs that Discharge or Are Proposing to Discharge (EPA-833-R-10-006) to provide guidance consistent with the court’s decision.

The court upheld, however, EPA’s authority to impose a duty to apply on CAFOs that “discharge.” The court explained, “[t]he text of the Act indicates that a discharging CAFO must have a permit [because] . . . discharging without a permit is unlawful, [section 301], and punishes such discharge with civil and criminal penalties, [section 309]. The court thus concluded that “[i]t logically follows that, at base, a discharging CAFO has a duty to apply for a permit.” *NPPC*, 635 F.3d at 751.

NPPC does not relieve EPA or authorized states from our responsibilities under the CWA to issue NPDES permits to CAFOs that discharge. Furthermore, a CAFO that has discharged without a permit remains in violation of the Act so long as there is a continuing likelihood that intermittent or sporadic discharges will recur. *Chesapeake Bay Found., Inc. v. Gwaltney of Smithfield*, 890 F.2d 690, 693 (4th Cir. 1989); *see also Carr v. Alta Verde Indus.*, 931 F.2d 1055, 1062 (5th Cir. 1991). *NPPC* does not affect the well-established principle that discharges of pollutants, whether continuous or intermittent and sporadic, require NPDES permit coverage. CAFOs that have discharged without a permit only cease to be in violation of the Act when circumstances that led to their discharge have changed or been corrected. CAFOs that have discharged in the past will discharge in the future, and are therefore expected to obtain a permit, unless the conditions that led to the discharge are fully remedied.

We should continue to work together with our state partners to ensure that discharging CAFOs have NPDES permits. We believe that is in a CAFO’s best interest to be covered under an NPDES permit because if a CAFO discharges without an NPDES permit as required by the CWA and federal regulations, it exposes itself to risk of citizen suits and CWA enforcement actions.

In addition to permitting, other on-going activities for EPA Regions include reviewing and approving state NPDES CAFO statutes, regulations, permits, and technical standards for land application. States were required by section 123.62(e) of the NPDES combined regulations, which outlines the timeline for state program updates, to update their statutes and regulations consistent with the 2008 CAFO rule by December 4, 2010. States that have not updated their programs must do so immediately. It is incumbent upon EPA Regions to hold states accountable for updating their programs in order to ensure a level playing field nationwide. Attached is a table that has been developed through working with your Regional staff regarding the status of CAFO regulation updates for all states. Please make sure it is current. I am asking my staff to work with your staff to ensure all states have updated CAFO NPDES programs, as soon as possible.

Let us know if you need assistance from my staff as we work together to achieve the environmental benefits of the CAFO regulations. If you have any questions please feel free to contact me at (202) 564-0748, Deborah Nagle at (202) 564-1185, or Allison Wiedeman at (202) 564-0901.

NPDES CAFO Rule Implementation Status -- National Summary, Midyear 2011, completed 6/30/11 (as reported by EPA Regions)

State	EPA Region	Total CAFOs: Estimated number of facilities defined as CAFOs under NPDES*	CAFOs with NPDES permits†	State's planned date for completing NPDES program revisions to address all provisions of CAFO NPDES regulations‡
Connecticut	1	6	0	None needed
Maine	1	4	4	None needed
Massachusetts	1	1	0	N/A--State does not have NPDES program authorization
New Hampshire	1	1	0	N/A--State does not have NPDES program authorization
Rhode Island	1	0	0	(no CAFOs)
Vermont	1	17	0	completed
New Jersey	2	5	5	planned 10/10
New York	2	604	604	TBD
Puerto Rico	2	1	0	N/A--PR does not have NPDES program authorization
Virgin Islands	2	0	0	(no CAFOs)
Delaware	3	73	0	Planned 11/11
Maryland	3	150	74	Regs approved 1/10 (approval of tech standards pending)
Pennsylvania	3	349	306	TBD
Virginia	3	188	0	Regs approved 6/10 (approval of tech standards pending)
West Virginia	3	68	0	Regs partially approved 10/10, revisions under review
Alabama	4	558	487	permit by rule effective since August 2011
Florida	4	100	56	completed 3/10
Georgia	4	828	152	TBD
Kentucky	4	150	67	completed 1/10
Mississippi	4	433	190	completed 1/10
North Carolina	4	1,222	14	completed; effective based on revision filed w/ Senate 3/09
South Carolina	4	201	0	TBD
Tennessee	4	129	79	completed 5/11
Illinois	5	500	27	revised draft rules submitted to EPA 5/11; rule package due 9/11
Indiana	5	634	524	planned to public notice on 3/11
Michigan	5	220	196	None needed (per State assessment)
Minnesota	5	1,204	1,168	None needed (per State assessment)
Ohio	5	192	31	proposed rules public noticed 6/11
Wisconsin	5	220	220	TBD
Arkansas	6	2,110	0	None needed (per State assessment)
Louisiana	6	250	4	completed 4/09
New Mexico	6	171	17	N/A--State does not have NPDES program authorization
Oklahoma	6	626	163	N/A--State does not have NPDES CAFO program authorization
Texas	6	1,108	608	planned fall 2011
Iowa	7	1,648	147	planned 4/10
Kansas	7	446	446	TBD
Missouri	7	521	521	planned 2012
Nebraska	7	862	393	hearing held 6/11 for NPDES
Colorado	8	188	68	planned 8/11
Indian Country (R8)	8	10	3	N/A--tribes do not have NPDES program authorization
Montana	8	117	90	planned 6/10
North Dakota	8	77	0	TBD
South Dakota	8	402	400	TBD

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State	EPA Region	Total CAFOs: Estimated number of facilities defined as CAFOs under NPDES*	CAFOs with NPDES permits†	State's planned date for completing NPDES program revisions to address all provisions of CAFO NPDES regulations‡
Utah	8	64	53	planned 6/11
Wyoming	8	51	45	planned 6/10; submitted revision package to EPA for review 12/09
Arizona	9	120	4	Rulemaking moratorium--TBD
California	9	1,011	188	No revision--State adopts prospectively
Hawaii	9	0	0	No CAFOs
Indian Country (R9)	9	1	0	N/A--no NPDES program authorization
Nevada	9	9	6	TBD
Alaska	10	0	0	(no CAFOs)
Idaho	10	365	103	N/A--State does not have NPDES program authorization
Oregon	10	552	552	None needed (per State assessment)
Washington	10	154	22	None needed (per State assessment)
TOTALS		18,921	8,037	

*All AFOs with numbers of animals above the size thresholds set out for large CAFOs are defined as CAFOs under the NPDES federal regulations. In some cases, such as Arkansas and Louisiana, the numbers have not yet been confirmed by the State.

†Under the NPDES CAFO regulations, CAFOs that discharge are required to seek NPDES permit coverage (40 CFR 122.23(d)(1)). As a consequence, the portion of CAFOs in each State that need NPDES coverage can vary from State to State.

‡Status indicated reflects current plans. In some cases, plans are still under discussion.